BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
To: The Commission	)	

NATIONAL ASSOCIATION OF REALTORS® COMMENTS ON JOINT PETITION FOR DECLARATORY RULING THAT THE FCC HAS EXCLUSIVE REGULATORY JURISDICTION OVER INTERSTATE TELEMARKETING

SUMMARY

The NATIONAL ASSOCIATION OF REALTORS® ("NAR") hereby submits these comments in support of the Joint Petition for Declaratory Ruling That the FCC Has Exclusive Regulatory Jurisdiction over Interstate Telemarketing ("Joint Petition") filed on April 29, 2005 in this docket by a group of 33 organizations (the "Joint Petitioners"). The language, history, and implementation of the Communications Act of 1934[1] and the Telephone Consumer Protection Act of 1991[2] ("TCPA"); the well-established jurisprudence of the Commission; and sound public policy benefiting both consumers and legitimate businesses all make clear that the FCC should assert exclusive regulatory jurisdiction over interstate telemarketing. In fact, the Commission's own Report and Order in the above-captioned docket implementing the

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1 47 U.S.C. § 151, *et seq.*

2 Pub. L. No. 102-243, 105 Stat. 2394 (1991).

regulations that pertain to telemarketing ("telemarketing rules") essentially said as much.[3] But absent a firm declaratory ruling to that effect, the record indicates that persons engaged in plainly interstate activity and clearly complying with the Commission's comprehensive telemarketing regime nonetheless could be ensnared by an obscure provision in one of the dozens of state telemarketing laws on the books. A declaratory ruling therefore flows directly from the Communications Act and seventy years of Commission precedent, and also will facilitate commerce and protect consumers.

BACKGROUND

NAR represents over 1.2 million real estate practitioners. The world's largest professional trade association, NAR is composed of real estate professionals who are involved at the local level in residential and commercial real estate nationwide as brokers, salespeople, property managers, appraisers, counselors, investors, developers and others engaged in all aspects of the real estate industry. The real estate industry employs over three and a half million people and represents a vital segment of our economy that drives numerous other industries, including the financial, construction, furniture, and appliance sectors. Particularly now, real estate is one of this country's leading areas of economic growth and stability, and it is therefore vital to the United States economy. As a result, it is likely that any rule imposing additional and unnecessary costs on the real estate industry may ultimately have a detrimental impact on the nation's economy – including on consumers.

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[3] Report and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (rel. July 3, 2003) ("Report and Order").

I. TELEPHONE CALLS AND THE REAL ESTATE INDUSTRY

As anyone who has bought or sold real property knows, the telephone is essential to the real estate trade. For example, real estate brokers and agents regularly place calls to potential clients who have made an inquiry about their services with regard to either buying or selling property. Because of the nature of the real estate industry, these inquiries are often highly informal and represent an important way for agents to meet new clients. To maintain the vitality of the industry, real estate professionals need to be able to quickly follow up on these consumer inquiries with a phone call. Real estate professionals also often place calls to former clients to alert them to particular property in which they may – based on past experience – be interested, as well as to clients of affiliates, friends, and friends of friends for similar reasons. The use of the telephone as a tool for real estate professionals to spread word of mouth and simply keep in touch with current, former, and affiliate clients is vital.

Many of these calls cross state lines. It is true that a number of real estate professionals trade only in local property – but that does little to minimize the volume of interstate calls that they must place. For example, many "localities" – including a significant number of this country's major metropolitan areas – are spread over multiple states. Thus, real estate professionals based in the District of Columbia place calls regularly not only within the District, but also to Maryland, Virginia, and West Virginia; real estate agents in the New York City region routinely call New York, Connecticut, and New Jersey; real estate brokers in Memphis call not only within Tennessee, but also Mississippi and Arkansas; and on and on. Interstate calls may therefore be an integral part of the daily life of even the most locally focused real estate professional.

In addition, because an individual must buy, sell, or rent real property virtually any time he or she moves, real estate professionals frequently place calls well beyond their local area. For instance, an individual moving from Wisconsin to Massachusetts will likely need to buy or rent a home in the latter before he moves – but may not be able to visit before doing so. If the Wisconsin resident makes an informal inquiry about property to a real estate professional in Massachusetts, that professional needs to call him back promptly. And this type of interstate telephone communication happens thousands of times every day between real estate agents and their potential, current, and former clients.

In some areas of the United States, interstate telephone calls are particularly important to real estate professionals. For instance, real estate agents who sell or rent vacation property – from beach homes to mountain cabins – routinely place calls to potential, current, and former clients who live in other states around the country. For all these reasons, the swift placement of interstate calls is vital to the continued success of the industry.

II. THE COMMISSION'S EXISTING TELEMARKETING RULES

On July 3, 2003, the Commission issued its Report and Order promulgating a comprehensive set of regulations governing telemarketing. These regulations – particularly in combination with a similar set of rules implemented and enforced by the Federal Trade Commission – established a broad consumer protection scheme that provides strong protection to consumers against unwanted, deceptive, costly, or otherwise annoying telephone calls while also giving clear guidance to the numerous legitimate entities that rely on the telephone to do business.

In addition to the successful Do-Not-Call List, the telemarketing rules offer numerous protections for consumers, including placing strict limits on the use of autodialers and prerecorded messages; confining to reasonable waking hours the times at which telemarketers may call; prohibiting "abandoned" calls; and requiring telemarketers to provide on each call their name, plus the underlying seller's name and contact information.[4] At the same time, the Commission's rules allow legitimate businesses to get in touch with individuals with whom they have an established business relationship. The rules also carve out sensible exceptions in certain circumstances – for example for prerecorded messages that are not commercial or are transmitted pursuant to an established business relationship or express consent.[5]

Perhaps most importantly, in virtually every circumstance, the rules empower consumers to put a stop to unwanted calls – even calls made pursuant to an exemption. In general, an individual can always tell a telemarketer (or call back the number required on a prerecorded message) that he or she no longer wants to be called by the underlying seller – and the seller has to honor that request.[6] The Commission's rules give consumers control over their telephones while allowing commerce to flourish. Anyone who argues to the contrary ignores the successful rules the Commission has adopted in this area.

ANALYSIS

The Joint Petition asks the Commission to issue a declaratory ruling that it has exclusive regulatory jurisdiction over interstate telemarketing calls. NAR supports this Petition. The relevant statutes, the Commission's well-established jurisprudence with respect to interstate calls, and public policy all weigh strongly in favor of such a ruling. In contrast – absent such a ruling – persons engaged in plainly interstate activity and who are already complying with the comprehensive federal scheme will continue to run afoul of the idiosyncrasies of various state

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4 *See generally* 47 C.F.R. § 64.1200.

5 *See* 47 C.F.R. § 64.1200(a)(2).

6 *See* 47 C.F.R. § 64.1200(b), (d)(3).

telemarketing laws enforced against out-of-state callers. Experience has shown that the Commission's current case-by-case preemption review system, while perhaps good in theory, offers little protection in practice to the countless legitimate entities that comply with the Commission's rules but are still subject to costly litigation and negative publicity in connection with State Attorney General actions.

I. APPLICABLE LAW DICTATES THAT THE COMMISSION SHOULD EXERCISE EXCLUSIVE JURISDICTION OVER INTERSTATE CALLS

In the unique area of telecommunications, Congress drew and has maintained a bright line between interstate and intrastate activities. For more than 70 years, the Commission has had exclusive regulatory jurisdiction over *inter*state communications, and states have had exclusive jurisdiction over *intra*state communications. The TCPA, which amends the Communications Act, did not fundamentally alter – and in fact falls within – this longstanding dual regulatory scheme.

A. The Relevant Statutes Support Exclusive Regulatory Jurisdiction over Interstate Calls

Section 227(e)(1) of the TCPA provides that "nothing in this section [] shall preempt any State law that imposes more restrictive *intra*state requirements or regulations on, or which prohibits" the use of particular telemarketing practices.[7] This provision – like the language of TCPA in general – is silent as to interstate calls. In the Report and Order, the Commission noted that section 227(e)(1) is "ambiguous" with respect to interstate calls.[8] But the Commission erred because it found ambiguity where the express statutory language read in the context of the organic statute yields none. That a statute is silent on a particular point does not

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7 47 U.S.C. § 227(e)(1) (emphasis added).

8 Report and Order ¶ 82.

mean that it is ambiguous.[9] Instead, the specific statutory provision must be interpreted in the context of the larger statutory scheme, and here, that silence speaks loudly in favor of exclusive federal jurisdiction over interstate telemarketing calls.

The Communications Act of 1934 granted the Commission jurisdiction over "all interstate and foreign communication" but denied it jurisdiction with respect to "intrastate communication service."[10] More than 50 years later, the Supreme Court acknowledged the schism in telephone regulation that Congress had imposed "to divide the world into two hemispheres – one comprised of interstate service, over which the FCC would have plenary authority, and the other made of up intrastate service, over which the states would retain exclusive jurisdiction."[11]

This fundamental division had been in place for decades by the time the TCPA was written and enacted in 1991 as an amendment to the Communications Act. Indeed, the legislative history of the TCPA indicates that Congress did not even contemplate that states had *any* authority to regulate interstate telemarketing calls. The Senate Committee Report noted that "[f]ederal action is necessary because States do not have jurisdiction to protect their citizens against those who . . . place interstate telephone calls."[12] Senator Hollings stated unequivocally during consideration of the Act that "State law does not, and cannot, regulate interstate calls."[13] And the Congressional findings accompanying the TCPA were premised in part on the

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9 *See, e.g.*, *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); *Garrett v. United States*, 471 U.S. 773, 793 (1985).

10 47 U.S.C. § 152(a), (b).

11 *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

12 S. Rep. No. 102-178, at 5 (1991).

13 137 Cong. Rec. S16204-01, S16205 (1991) (remarks of Sen. Hollings).

conclusion that states simply had no authority over interstate calls: "Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations."[14] Had the states had any power with respect to interstate calls, of course, that Congressional finding would make no sense.

So while it may be true that the TCPA itself is silent with respect to the preemption of state laws governing interstate calls, it is wrong that the TCPA and the Communications Act of which it was made a part is ambiguous on that question. There was no point in stating in this 1991 amendment to the Communications Act that state laws affecting interstate telecommunications were preempted, because there was nothing to preempt. For more than 50 years it had been well-settled that the Communications Act preempted state regulation of interstate telecommunications, and that position had been strongly endorsed by the Supreme Court just a few years before. The TCPA therefore was written against this backdrop that states had no role to regulate interstate telecommunications. The inclusion of language preempting state laws governing interstate calls would thus have been "mere surplusage" – and it is well-established that Congress is presumed not to have included any such language that is unnecessary or redundant.[15]

B. The Commission's Own Jurisprudence Supports Exclusive Regulatory Jurisdiction over Interstate Calls

Congress is not the only entity to have understood and repeatedly reiterated that states have no jurisdiction to regulate interstate calls. In fact – as the Joint Petition notes – the

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14 H.R. Rep. 102-317, at 2 (1991).

15 *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994).

Commission itself has so concluded on many occasions.[16] These statements of exclusive regulatory jurisdiction have been consistent and unequivocal – in 1975: "The States do not have jurisdiction over interstate communications"; in 1991: "The Commission's jurisdiction over interstate and foreign communications is exclusive of state authority"; and in 2005: "In the absence of a specific statutory provision regarding jurisdiction . . . Congress has given the Commission exclusive jurisdiction over 'all interstate and foreign communication' and 'all persons engaged . . . in such communication.'"[17]

In substance, the 2003 Report and Order was no different. There – citing the seminal preemption case of *Louisiana Public Service Commission* – the Commission "recognize[d] that states traditionally have had jurisdiction over intrastate calls, while the Commission has had jurisdiction over interstate calls."[18] In fact, the Commission even acknowledged that Congress drafted the TCPA "based upon the concern that states lack jurisdiction over interstate calls" and referred to key elements of the Act's legislative history in support of this point.[19]

Though the Commission stopped short of asserting exclusive jurisdiction with respect to interstate telemarketing,[20] the substance of the Commission's findings was the same:

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16 Joint Petition at 33-34.

17 56 FCC 2d 14 at ¶ 21 (1975); 6 FCC Rcd. 4475 at ¶ 10 (1991); 19 FCC Rcd. 22,404 at ¶ 16 (2005).

18 Report and Order ¶ 83.

19 *Id.* (citing S. Rep. 102-178, at 3).

20 *See* Notice of Proposed Rulemaking and Memorandum Opinion and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 ¶ 48 (rel. Sept. 18, 2002) ("The Commission seeks comment on whether and, if so, to what degree, state requirements should be preempted. Some courts have held that the TCPA does not necessarily preempt less restrictive state laws on telemarketing. We seek comment on this interpretation. In addition, we ask whether preemption should depend on (continued…)

"it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. . . . We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted."[21] The Commission even went so far as to "encourage states to avoid subjecting telemarketers to inconsistent rules."[22]

As the Joint Petition demonstrates in alarming detail, however, many states have failed to heed that advice.[23] The issue of exclusive jurisdiction with respect to interstate telemarketing is now squarely before the Commission, and the Commission should assert such jurisdiction: doing so reflects the clear congressional allocation of jurisdictional responsibility and stands consistent with decades of Commission precedent.

C. The Commission Should Not Preempt State Laws Regulating Intrastate Calls

Just as the TCPA should be read to affirm the Commission's exclusive power over interstate calls, it also should be interpreted to reiterate the exclusive authority of the states

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whether the state law in question applies solely to intrastate telemarketing or to interstate telemarketing as well. What conflicts between state telemarketing laws and federal law might warrant preemption?").

21 Report and Order ¶ 83-84. In its own rulemaking with respect to the Do-Not-Call List, the Federal Trade Commission ("FTC") similarly noted that its "goal is a consistent, efficient system whereby consumers, in a single transaction, can register their requests not to receive calls to solicit sales of goods or services, and sellers and telemarketers can obtain a single list to ensure that in placing calls, they do not contravene those consumers' requests." 68 Fed. Reg. 4580, 4638 (Jan. 29, 2003).

22 Report and Order ¶ 84.

23 Joint Petition at 9-32.

with respect to intrastate calls.[24] As noted, the TCPA was concerned primarily with interstate – and not intrastate – telemarketing.[25] Nonetheless, it did explicitly prohibit the Commission from preempting any state law regulating intrastate telemarketing that is more restrictive than federal law.[26] The relevant provision of the TCPA does not address treatment of other state laws regulating intrastate telemarketing. Again, however, this silence should not be interpreted as ambiguity because the organic Communications Act and applicable Supreme Court precedent have supplied the answer to this question, too.

The Report and Order asserts with conclusory analysis that "by operation of general conflict preemption law," state do-not-call rules that have exceptions are preempted.[27] This analysis is in error because it ignores the TCPA's clear legislative goal to vest power in the Commission over interstate telemarketing because of evasion of state laws by out-of-state callers. More fundamentally, it ignores *Louisiana PSC* statement that the Commission should endeavor to respect state authority over intrastate calls where such separation of authority is possible.[28] It cannot be seriously argued that an "impossibility" analysis justifies preemption of state laws affecting intrastate telecommunications, because the Commission itself recognized that "states have a long history of regulating telemarketing practices."[29] Thus, because of the

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24 NAR has a petition for reconsideration still pending in this docket seeking a reversal of the decision in the Report and Order to preempt certain provisions of state laws affecting intrastate telemarketing.

25 H.R. Rep. 102-317, at 9-10.

26 47 U.S.C. § 227(e)(1).

27 Report and Order ¶ 81.

28 476 U.S. at 375-76.

29 Report and Order ¶ 75. The inclusion of section 227 within section 2(b)'s list of exceptions from the general rule of exclusive state jurisdiction over intrastate calls is of no moment. Under section 2(b), states have such jurisdiction "[e]xcept as provided in sections 223 (continued…)

dualism of our communications laws, and the Court's holding in *Louisiana PSC*, the Commission should take a more refined view than asserting blanket preemption. Such complete preemption of less restrictive laws governing intrastate calls in the Report and Order is also contrary to the Commission's stated belief "that it is critical to combine the resources and expertise of the state and federal governments" to address the do-not-call issue.[30]

Accordingly, we urge the Commission to conduct a more robust preemption analysis, and upon doing so conclude that states have authority over intrastate calls and expertise that is compatible with the Commission's interstate rules. Therefore, the Commission should assert exclusive jurisdiction over interstate calls only, and not preempt state laws governing intrastate calls. This interpretation is required by the dual regulatory regime that defines our communications laws.

II. PUBLIC POLICY DICTATES THAT THE COMMISSION SHOULD EXERCISE EXCLUSIVE JURISDICTION OVER INTERSTATE CALLS

Asserting exclusive regulatory jurisdiction over interstate telemarketing is not only supported by statute and the Commission's own precedent, but also by sound public policy. In practice, the current patchwork of state laws governing interstate calls creates needless confusion, imposes undue burdens and risks on legitimate businesses, and only leads to consumer confusion.

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through 227." 47 U.S.C. § 152(b). But at least in this context, section 227 "provides" nothing to suggest that the Commission is authorized to assert a blanket preemption with respect to those state laws governing intrastate calls that are not more restrictive than federal law. To the contrary, the plain language of section 227 makes clear that the only state laws governing intrastate calls the Commission may preempt in this context are *more* restrictive state laws with respect to the technical and procedural standards under section 227(d), and other state laws related to the establishment of state-specific do-not-call lists under section 227(e)(2). The reference to section 227 in the list of possible exceptions under section 2(b) is therefore not relevant in this context.

30 Report and Order ¶ 75.

The TCPA made clear that telemarketing is a national issue that affects residents throughout the United States. As the Commission recognized in the Report and Order, "inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs and potential consumer confusion."[31] The purpose of the TCPA is "to protect the privacy interests of residential telephone subscribers," and, as noted, the Commission established in its telemarketing rules a comprehensive regime that does just that.[32]

Although each state should be able to dictate the requirements for intrastate telemarketing calls placed by a caller in that state to a recipient in that state – under the traditional dual regulatory regime in the area of communications and because such calls do not directly impact interstate commerce – there is no reason why that state should be able to subject entities operating beyond its borders to those same rules. Unlike in areas such as real estate licensing – where a real estate professional from one state actually transacts business in another state and should therefore be required to adhere to the latter state's substantive licensing laws – telemarketing laws are communications laws. And for seven decades the federal government has been uniquely positioned to – and in fact thoroughly does – regulate the type of interstate communications that arise in the telemarketing context.

The existing patchwork of state regulation has become untenable for both businesses and consumers. In general, any company that places interstate calls – including countless real estate professionals – has three choices: (1) abide by the strictest applicable state law standard; (2) take measures to compartmentalize its calls on a state-by-state basis; or (3) rely on the Commission's statement in the Report and Order that conflicting state laws governing

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31 *Id.* ¶ 83.

32 S. Rep. 102-178, at 1.

interstate calls "almost certainly would be preempted" and worry about complying only with the federal telemarketing rules.[33] None of these options, however, is defensible.

Under the first approach, the Commission's telemarketing rules are rendered virtually meaningless: because various states have stricter (though very different) standards with respect to nearly every component of those rules, an entity that attempts to comply with state laws using the highest common denominator will, for example, generally <u>not</u> be able to: call individuals with whom it has an established business or personal relationship; use autodialers or prerecorded messages in most circumstances that are lawful under the federal rules; place calls at numerous times that are otherwise permissible; or even get to the substance of the call in any reasonable time, given the voluminous and varied disclosure requirements among the 50 states.[34] Under that approach, for instance, Wisconsin law becomes *de facto* federal legislation governing (or, in fact, generally eliminating) the established business relationship exception; Alaska, Nevada, and Tennessee statutes control the use of prerecorded messages and autodialers; Louisiana and Rhode Island set the national standard for calling times; and Idaho, Kentucky, and South Dakota statutes impose the national requirements for required disclosures. This bizarre but true result is antithetical to the entire history of communications regulation in the United States, and also makes no practical sense. Under this highest common denominator standard, that Massachusetts real estate professional likely could not respond by phone to the inquiry from the Wisconsin resident – or, indeed, to virtually any inquiry from any potential client throughout the United States.

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33 Report and Order ¶ 84.

34 *See generally* Joint Petition at 9-32.

The second option – attempting to comply with telemarketing requirements on a state-by-state basis – is more sensible in theory, but completely unworkable in practice. In contrast with intrastate calls – where the caller knows that it is subject to one set of state rules that it can therefore devote the necessary time and effort to understand and follow – the volume and diversity of interstate calls and the state laws that purport to govern them make compliance highly difficult. Even the most sophisticated company that tried this approach would need to employ an army of lawyers to untangle the web of conflicting and often ambiguous state statutes governing telemarketing, and then somehow translate those requirements into state-by-state guidelines accessible to every employee who ever places a "telemarketing" call (the definition of which varies from state to state). Before placing a call, every caller would need to figure out which state he or she was calling, and then familiarize himself with that state's unique requirements (as well as any differences from the federal rules). And, given the frequency with which many states amend their telemarketing statutes, every set of state laws would need to be monitored – and the telemarketing guidelines updated and employees retrained on an ongoing basis. Determining how, when, where, and even whether to place a sales call would be an expensive proposition for every U.S. company, but especially burdensome for small businesses such as real estate professionals, most of whom work in small or mid-sized entities and simply cannot afford the time and money to develop a telemarketing compliance flowchart that keeps current with nearly 50 sets of divergent laws.

The third approach – complying with the federal rules but ignoring state laws with respect to interstate calls in reliance on the Commission's statement that such laws would likely be preempted – fares no better. The case-by-case approach that the Commission proposed in the Report and Order may have showed deference to the states, but the states have not reciprocated.

As the Joint Petition shows, states are aggressively taking action against companies placing interstate calls *in compliance with the federal rules* but in contravention of obscure state requirements – actions that flout the letter and violate the spirit of the Report and Order. Under this approach, the Massachusetts real estate agent could call back the Wisconsin resident – but she risks state enforcement action by doing so.

No matter which option companies select, the existing patchwork hurts not only businesses but also consumers, because it is a harmful distraction from what Congress has stated is important – protecting the privacy interests of residential telephone subscribers. The TCPA directed businesses to focus on – and therefore readily comply with – only two sets of requirements: the federal rules for interstate calls, and their state's law for intrastate calls. In contrast, the current system is so convoluted and compliance so costly that entities may be forced simply to not comply at all – a solution that helps no one.

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For the reasons stated herein, the NATIONAL ASSOCIATION OF REALTORS®

asks the Commission to issue a declaratory ruling that the Commission has exclusive regulatory jurisdiction over interstate telemarketing.

Respectfully submitted,

NATIONAL ASSOCIATION OF REALTORS®

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